Neutral Citation Number: [2025] EWHC 1943 (Ch)

Case No: PT-2025-000740

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

IN THE ESTATE OF FRANK COWLEY DECEASED

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

28th July 2025

Before:

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT

- -

Between:

MICHAEL JOHNSON **Applicant**

- and –

HIS MAJESTY's ATTORNEY-GENERAL **Respondent**

- -
- -

Christopher Buckley (instructed by **Ashfords LLP**) for the **Applicant**
Gareth Tilley (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 21 July 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 28 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Julian Flaux C:

Introduction

1. The Court has before it an application by Summons for an Order under Section 124 of the Senior Courts Act 1981 and Rule 58 of the Non-Contentious Probate Rules 1987 sealing the will of Frank Cowley who, until he changed his name by deed poll in January 2020, was known as Freddie Scappaticci. He died on 20 March 2023. I will refer to him as "the Deceased". The application also seeks various ancillary orders contingent on the will being sealed.

2. The sole defendant to the Summons is His Majesty's Attorney-General, whose role is to represent the public interest.

3. Under the Deceased's will, his then solicitors were named as executors, but they renounced their right to act as executors by a deed dated 28 March 2023. The applicant is prepared to act as the Deceased's Personal Representative provided that the will is sealed and that his true identity is not disclosed.

4. At a hearing in private on 21 July 2025, having heard submissions from Mr Christopher Buckley for the applicant and Mr Gareth Tilley for the Attorney-General, I determined that the hearing should proceed in private. Having heard further submissions, I announced my decision that I would grant the Order sought and would hand down a judgment giving my reasons for that decision, in so far as those reasons could be set out in an open judgment, at a later date. This is that judgment.

Background

5. The Deceased is alleged to have been a leading member of the Provisional Irish Republican Army ("IRA") and its internal discipline unit known as the "Nutting Squad" from about 1980 until the mid-1990s. The alleged purpose of the Nutting Squad, according to press reports, was to interrogate and, on occasion, murder suspected informers whom the IRA suspected may have been spying on them and passing information to the British Government.

6. In May 2003, there were articles in several newspapers, including The Guardian, which accused the Deceased of having spied on the IRA for the British Government and of being the agent codenamed "Stakeknife" (who is alleged to have been an agent for the British Army whilst also being a leading member of the IRA). The press reports alleged that whilst working for both the British Government and the IRA, the Deceased was responsible for the torture and murder of dozens of alleged IRA informers.

7. The allegation that the Deceased was working for the British Government was particularly inflammatory in the Catholic community in Northern Ireland given that he was alleged to have been responsible within the IRA for dealing with individuals accused of spying on the IRA.

8. The Deceased always vehemently denied the claim that he had been an agent of the British Government. His solicitors in Northern Ireland wrote to the then Minister of State at the Northern Ireland Office asking the Government to confirm that the

Deceased was not the agent "Stakeknife". The Minister declined to comment, so the Deceased issued an application for Judicial Review. Permission to make that application was granted, at which point the Minister agreed to review the original decision. Thereafter, the then Permanent Under-Secretary of State swore an affidavit setting out the Government's long-established policy to neither confirm nor deny the identity of agents (the so-called "NCND" policy). The Minister had taken account of the matters raised by the Deceased including the threat to his life but concluded that no statement would be made.

9. The application for Judicial Review was dismissed by Lord Carswell CJ in a judgment dated 18 October 2003 ([2003] NIQB 56), largely because he accepted the submissions of the Government as to the consequences which would be likely to ensue if exceptions were made to the NCND policy. Two paragraphs in that judgment are of relevance to the present application:

> "[2] On or about Sunday 11 May 2003 articles commenced to appear in newspapers, followed by television coverage, to the effect that the applicant had been an undercover agent working within the IRA for the security services as an informer, with the code name of Stakeknife. It is a matter of notoriety that the IRA pursues and executes persons suspected of being informers, and it was not in dispute that the naming of the applicant as Stakeknife has put his life in severe danger. The applicant has made vigorous attempts to dispel the suspicion by making public denials, through press statements and a television appearance, but press interest in his identity has not diminished.
>
> [12] In the present case it was readily apparent that there was a real and present danger to the life of the applicant when it was alleged in the Press that he was the agent known as Stakeknife…"

10. The Deceased moved to England in 2003, following the publication of the articles alleging he was an agent of the British Government and changed his name. He could not have remained in Northern Ireland, as he could have been killed by one side or the other. Even after he moved to England and changed his name, he continued to receive death threats. Such was their nature that he had to relocate at short notice several times over the years.

11. The threat to his life was so serious that on 29 June 2006, the High Court in Northern Ireland granted an injunction prohibiting the publication of information which might lead to the Deceased being identified or his whereabouts discovered. The injunction was only discharged on 9 January 2024, after his death, on the application of the BBC and others, which demonstrates the interest which still remains about the Deceased.

12. Notwithstanding the formal media reporting restrictions, interest in the Deceased continued. In about 2017, dissident Republicans with balaclavas covering their faces gathered in a cemetery at a commemoration of the Easter rising and recorded a video published on YouTube stating that the Deceased was their number one target.

13. Matters escalated again in 2018 when the Deceased's home in England was raided by police officers working on Operation Kenova. This was launched in 2016 and is one of a series of independent historical investigations into a range of activities

surrounding the alleged agent codenamed Stakeknife. The website of Operation Kenova states:

> "The focus of this investigation is to ascertain whether there is evidence of the commission of criminal offences by the alleged agent including, but not limited to, murders, attempted murders or unlawful imprisonments attributed to the Provisional IRA. It will also look at whether there is evidence of criminal offences having been committed by members of the British Army, the Security Services or other government personnel."

14. Operation Kenova is ongoing and continues to attract regular press interest. An Interim Report from the former Chief Constable of Bedfordshire Jon Boutcher was published on 8 March 2024. In the section dealing with the alleged agent Stakeknife, he says that because a significant number of prosecution files are with the Public Prosecution Service of Northern Ireland ("PPSNI") he cannot yet report in detail about the agent's alleged criminal activities. However, he says that he believes those files contain significant evidence implicating Stakeknife and others in very serious criminality and that this needs to be ventilated publicly.

15. In relation to the Deceased, the Executive Summary in the Report states:

> "More than 20 years ago, public allegations were made that Freddie Scappaticci had been active during the Troubles as both a senior member of the PIRA ISU and also an Army agent code-named Stakeknife. It is well known that he was a member of the PIRA ISU and a critical person of interest at the heart of Operation Kenova, but I make no comment about the allegation that he was Stakeknife and nothing in this report can or should be taken to represent such a comment."

16. It then refers to the Deceased's arrest in 2018 when his laptop was found to contain extreme pornography. He pleaded guilty at Westminster Magistrates' Court and was sentenced to 3 months' imprisonment suspended for 12 months. The Report also refers to perjury allegations made against the Deceased in relation to a series of affidavits he had sworn, but it notes that in October 2020 the Director of Public Prosecutions of Northern Ireland announced that he had decided not to prosecute. The Report also refers to civil claims being pursued against the Deceased in Northern Ireland (referred to in more detail below) and to his unsuccessful Judicial Review in 2003.

17. In relation to the Deceased, paragraphs 2.5 and 2.9 of the Interim Report state:

> "[2.5] The truth about the identity of Stakeknife will have to be officially confirmed at some point, but I am not able to address it in this interim report and will have to leave this to my final report. That report will confirm the truth and set out the full facts and I am confident that publication will benefit and not harm the public interest. For now, it suffices to say that Mr Scappaticci was and still is inextricably bound up with and a critical person of interest at the heart of Operation Kenova.

> [2.9] It is public knowledge that Mr Scappaticci was one of the people we arrested and interviewed under caution as part of our investigation and I can confirm that he was the subject of a number of files submitted by us to PPSNI. It will never be known whether he would have been prosecuted and, if so, pleaded guilty or been convicted at trial, but it is my view that he could and should have been. I believe that we found strong evidence of very serious criminality on the part of Mr Scappaticci and his prosecution would have been in the interests of victims, families and justice."

18. Following the raid on his home by Operation Kenova officers, it was necessary for the Deceased to change his name again and to relocate for his own safety. His neighbours had given misleading interviews to the national press and his identity and whereabouts were compromised.

19. There are currently sixteen claims before the High Court in Northern Ireland against the Deceased arising out of his alleged role in the IRA. Other defendants are named including the Chief Constable of the Police Service of Northern Ireland and the Ministry of Defence. The claims are for primary victim unlawful detention and false imprisonment and secondary victim murder and false imprisonment and are brought by alleged victims or family members of alleged victims. No date has yet been fixed for trial as the disclosure phase in those claims has been held up by Operation Kenova. Although the Deceased is named as a defendant in the claims in Northern Ireland, since his death, this needs to be updated to substitute his Personal Representative.

20. Following the Deceased's death and the publication of the Operation Kenova Interim Report, significant media interest in both Northern Ireland and the United Kingdom generally has been generated with numerous newspaper articles, books and podcasts published which named the Deceased as Stakeknife.

The relevant law

21. Since the Probates and Letters of Administration Act 1857 which transferred the testamentary jurisdiction of the ecclesiastical courts to a new Court of Probate, the general rule has been that, when a grant of probate is made in respect of a deceased's estate, the will and other documents relevant to that grant are open to inspection by the public. The current statutory provision is Section 124 of the Senior Courts Act 1981 as amended, which provides:

> "All original wills and other documents which are under the control of the High Court in the Principal Registry or in any district probate registry shall be deposited and preserved in such places as may be provided for in directions given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005; and any wills or other documents so deposited shall, subject to the control of the High Court and to probate rules, be open to inspection."

22. The Non-Contentious Probate Rules 1987 (SI 1987/2024) (the "NCPR") govern the operation of the probate system. Rule 58 provides:

> "An original will or document referred to in section 124 of the [Senior Courts] Act shall not be open to inspection if, in the opinion of a District Judge or Registrar, such inspection would be undesirable or inappropriate."

23. By section 34 of the Supreme Court of Judicature Act 1873, all causes and matters which would have been in the exclusive jurisdiction of the Court of Probate were assigned to the Probate, Divorce and Admiralty Division of the High Court. That Division was renamed the Family Division by section 1 of the Administration of Justice Act 1970. Contentious probate business was assigned to the Chancery Division, but non-contentious probate business remained assigned to the Family Division. However, when the District Judge in the Principal Registry, who was the only judge conducting non-contentious probate work (of which there is very little) retired in about 2020, it was agreed with the Principal Registry that, in future, non-contentious probate work would be transferred to the Chancery Division, with a Chancery Master sitting as a District Judge for the purposes of the NCPR.

24. As set out further below, the present case is the first application there has been for the sealing of a will under Rule 58 of the NCPR, other than the cases of Royal wills to which I will refer. In the circumstances, I determined that it should be heard by me as Chancellor of the High Court and head of the Chancery Division rather than by a Chancery Master sitting as a District Judge.

25. There is a long-standing custom of wills of senior members of the Royal Family being sealed. The modern cases begin with the wills of the late Queen Elizabeth, the Queen Mother and the late Princess Margaret, Countess of Snowden whose wills were sealed by Order of the then President of the Family Division, Dame Elizabeth Butler-Sloss, on 10 April 2002 and 19 June 20002 respectively, with the proviso that the will should not be opened "without the consent of the President of the Family Division for the time being". There was no public hearing and no reasons for the decision were published.

26. In 2006, Robert Brown, who claimed to be the illegitimate child of Princess Margaret, made an application for the wills to be opened to public inspection. The executors applied to strike out the application and by his judgment the then President of the Family Division, Sir Mark Potter, struck it out on the grounds that in so far as Mr Brown was seeking to asset a private right, his claim to be the child of Princess Margaret was unsustainable and in so far as he was seeking to assert a right as a member of the public, that was the exclusive domain of the Attorney-General: *Brown v Executors of the Estate of HM Queen Elizabeth the Queen Mother* [2007] EWHC 1607 (Fam) at [55] to [63].

27. Of relevance to the present application is what Sir Mark Potter P said at [41] about Section 124 of the Senior Courts Act and Rule 58 of the NCPR:

> "The right provided for in s.124 of *The Supreme Court Act* is not, as Mr Robertson at one stage submitted, a general and unfettered right of inspection in respect of all wills deposited in the Registry. The wording of s.124 anticipates control by the High Court of the right to inspect, subject to and in accordance with probate rules, currently contained in the NCPR, which by Rule 58 plainly permit curtailment of what would

> otherwise be a right available to members of the public generally if, in the opinion of a District Judge or a Registrar (or in this case the President) public inspection of a particular will would be undesirable or otherwise inappropriate. It has been no part of Mr Robertson's argument that Rule 58 is *ultra vires* s.124. The NCPR provides no guidance upon the question of what facts or circumstances may be apt to justify a decision to close or seal a will from public inspection, but it is to be presumed that the power to do so is concerned with considerations of privacy and the perceived necessity in particular cases to protect from harm, harassment, intrusion or publicity those who are beneficiaries, potential beneficiaries, or otherwise interested under the will or who, for other reasons, may be adversely affected if the provisions of the will are open to public inspection. Equally, it is to be presumed that, in relation to such a decision, those considerations of privacy fall to be weighed against the manifest general statutory presumption in favour of openness in respect of all wills subject to probate."

28. Mr Brown appealed to the Court of Appeal who allowed the appeal on the narrow ground that standing to assert a public right to inspect a will was not confined to the Attorney-General but could be asserted by any person. It could not be said that Mr Brown's claim on the basis of his public right was doomed to fail because of, inter alia, the lack of transparency in the process by which the original orders sealing the wills had been made and the doubt as to the criteria applied: see the judgment of the Court (Lord Phillips of Worth Matravers CJ, Thorpe and Dyson LJJ): *Brown v Executors of the Estate of HM Queen Elizabeth the Queen Mother* [2008] EWCA Civ 56; [2008] 1 WLR 2327 at [37] and [46].

29. At [39] of their judgment, the Court of Appeal identified five issues raised by the application:

> "The plaintiff's application to Sir Mark Potter P raised the following issues. (i) What principle underlies the exposure of wills to public inspection on the terms of sections 124 and 125 of the 1981 Act? (ii) What considerations are relevant to the question of whether inspection would be "undesirable or otherwise inappropriate" under rule 58? (iii) Where a will is "sealed" pursuant to rule 58, what is the nature of the interest that an applicant must show in order to be permitted to inspect that will? (iv) Is it appropriate to have a special practice in relation to royal wills? If so: (v) what, if any, information about that practice should be made public?"

The Court of Appeal left those issues to be resolved by Sir Mark Potter P at a substantive hearing of Mr Brown's application, but, in the event, he did not pursue his application.

30. In 2017, an application was made to the then President of the Family Division, Sir James Munby, for the unsealing of the will and codicil of the late Duke of Windsor by the Librarian and Assistant Keeper of the Queen's Archives at Windsor Castle. A copy of the will and codicil was being sought for research purposes to fill gaps in its holdings and to identify who held the copyright in literary works created by the Duke

of Windsor. It had been sealed by Order of Sir George Baker P on 13 October 1972. In his short judgment granting the application ([2017] EWHC 2887 (Fam)), Sir James Munby P noted that the application was not to reverse the Order of Sir George Baker P so that the will and codicil were open to inspection by the general public but just to authorise the disclosure of copies of the will and codicil to the Librarian and Assistant Keeper of the Queen's Archives. He held that both reasons for the application were compelling and made the Order sought.

31. After the death of Prince Philip, Duke of Edinburgh in 2021, his executor applied for an Order that his will be sealed and no copy be made for the record or kept on the Court file and that the value of his estate be excluded from the grant of probate. That application was heard in private by the current President of the Family Division, Sir Andrew McFarlane, who granted the Order sought and subsequently delivered a fully reasoned judgment setting out, so far as they could be disclosed in an open judgment, the reasons for his decision: *In re the Will of His Late Royal Highness The Prince Philip Duke of Edinburgh* [2021] EWHC 77 (Fam); [2022] 3 All ER 187.

32. At [28] the President set out the factors suggested by Mr Julian Smith, the private solicitor to the Queen and a partner of Farrer & Co, the Royal solicitors, which supported the general right of public inspection dating back to 1857:

> "a) Publicity should ensure that effect is given to the wishes of the testator;
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> b) The task of notifying and tracing legatees may be facilitated if the will is made public;
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> c) Publication of a will might serve a general interest in notifying the deceased's creditors of the death;
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> d) In circumstances where a testator's true, final will has been lost or supressed, others may come forward to prove a document in respect of which probate should be granted, those individuals having been alerted by the publication of a purported true will;
>
> e) Publication may give notice to those who might have a claim under the Inheritance (Provision for Family and Dependants) Act 1975.

33. At [39] the President referred to an article by Professor Joseph Jaconelli which questions the justification for the general rule that wills should be open to public inspection:

> "In the course of his substantive submissions in favour of the application Mr Crow drew attention to an article by Professor Joseph Jaconelli (Law School, University of Manchester) " *Wills as public documents – privacy and property rights* " [Cambridge Law Journal 71(1) March 2012 147] which questions what justification there is for the current law which requires every will to be open to public inspection. Professor Jaconelli draws attention to the 'report of the committee on privacy' under the chairmanship of Sir Kenneth Younger in 1972 which reported the findings of a survey into the views of the

> public. Under the heading 'publication of will', 77% of those canvassed were of the opinion that this was an invasion of privacy, while 71% believed that it should be prohibited. In circumstances where there is no clear account of the legislature's reasons over 160 years ago for requiring the publication of wills and where, now, the right to privacy is, generally, taken very seriously, it is legitimate to question what weight should be given to the need for openness with respect to a will in any particular case."

34. At [44] the President referred to the submissions made by the Attorney-General on the public interest in the form of a balance sheet, with the points in favour of public inspection of the will including:

> "a) The prevention of fraud.
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> b) To enable a potential applicant under the Inheritance Act 1975 to know who has inherited the estate and therefore assess the merits of their claim.
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> c) To enable creditors to protect their rights.
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> d) Transparency in respect of the finances of senior members of the Royal Family given their constitutional roles and taxpayer-funded support.
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> e) Historic and journalistic interest."

35. At [45] the President set out the public interest factors which the Attorney-General submitted were against public inspection:

> "a) Protecting the privacy and dignity of the Sovereign and Her close family and the institution of the monarchy, so as to preserve their position and ability to fulfil their paramount constitutional role as a unifying symbol of the nation and the Head of State.
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> b) Protecting the Sovereign and other members of the Royal Family from undue intrusion into private matters.
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> c) Consistency of practice for over 75 years.
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> d) The important demarcation between the public role of the Sovereign and senior members of the Royal Family, and their personal privacy. The former is subject to the scrutiny of Parliament and the statutory scheme of the Sovereign Grant Act 2011, and the latter is private.
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> e) There being no real possibility in any case involving close family members of the Sovereign of fraud or unsatisfied creditors.
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> f) Crucially, it being open to any person able to demonstrate a private interest in examining the will to make such an application to the court for its disclosure."

36. At [51], the President addressed the test in Rule 58 of the NCPR:

> "Whilst the provision creates an exception to the norm, the wording of the rule does not require there to be 'exceptional' circumstances. The words 'undesirable' and 'inappropriate' are not qualified by the addition of an adverb such as 'wholly' or 'significantly'. The conjunction separating them is 'or' rather than 'and', so that only one of the two conditions is required to be satisfied rather than both. The terms 'undesirable' and 'inappropriate' should be given their ordinary meaning. On that basis, the hurdle established by r 58, whilst requiring an applicant to make out a clear case for departing from the normal rule, is not an especially high one."

37. At [62], the President gave answers in relation to the five issues raised by the Court of Appeal in *Brown* (set out at [29] above):

> "i) It has not been possible to identify what principle lay behind the enactment of the ordinary rule that is now in SCA 1981, ss 124 and 125 that wills should ordinarily be exposed to public inspection. The various factors identified by Mr Smith (see paragraph 28 above) are important and are likely to be relevant. That said, as the article by Prof Jaconelli suggests, the question of whether such a rule is still justified or acceptable to the public in the 21st century may be an open one.
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> ii) I have held that the hurdle in r 58 is not a high one and that the words 'undesirable' and 'inappropriate' should have their ordinary meaning. No attempt has been made to offer an exhaustive list of relevant considerations for all types of cases; the focus of this judgment is firmly confined to the wills of senior members of the Royal Family.
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> iii) Question (iii) does not arise for consideration in this application and the issue has not been addressed.
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> iv) I have held that, because of the constitutional position of the Sovereign, it is appropriate to have a special practice in relation to Royal wills. There is a need to enhance the protection afforded to truly private aspects of the lives of this limited group of individuals in order to maintain the dignity of the Sovereign and close members of Her family.
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> v) As much detail as possible, short of compromising the conventional privacy afforded to communications from the Sovereign, should be made public as to the process by the publication of this judgment."

38. There was an appeal to the Court of Appeal by Guardian News and Media Limited on the grounds that (i) the President had been wrong to hold that only the Attorney-General could speak, as a matter of law, to the public interest in media attendance and the substantive issues raised by the application; (ii) the President had been wrong in law to deny the media an opportunity to make submissions on whether the substantive

hearing should be in private; and (iii) the President had wrongly failed to consider any lesser interference with open justice than a private hearing excluding all press representatives.

39. The Court of Appeal (Sir Geoffrey Vos MR, Dame Victoria Sharp P and King LJ) unanimously dismissed the appeal, albeit King LJ was more doubtful on the third issue: *Executor of HRH Prince Philip Duke of Edinburgh v Attorney-General* [2022] EWCA Civ 1081; [2023] 1 WLR 1193. At [5] of the judgment of Sir Geoffrey Vos MR and Dame Victoria Sharp P, they summarised without any adverse comment Sir Andrew McFarlane P's reasons for his decision to seal the will:

> "The PFD's reasons for his decision to seal the Will were, in summary, as follows. First, the exception from the ordinary rule as to the publication of wills was rooted in the unique status of the Sovereign and Head of State. Secondly, there was an inherent public interest in protecting the dignity of the Sovereign and the close members of Her family in order to preserve their position and allow them to fulfil their constitutional roles. Thirdly, there was real constitutional importance in maintaining the dignity of the monarchy, and a public interest in protecting the private rights of the Sovereign and close members of the Royal Family. Fourthly, none of the factors that might support the principle that wills should be open (for example, the avoidance of fraud or alerting potential third party claimants) was likely to apply to senior members of the Royal Family. Fifthly, whilst there might be public curiosity as to the private provisions in the Will, there was no true public interest in the public knowing such wholly private information. Moreover, the media's interest was commercial, and the likely degree of publicity was contrary to the maintenance of the dignity of the Sovereign. Finally, since the convention in favour of sealing Royal wills had been in place for over a century, Prince Philip was likely to have made the Will on the understanding that it was not going to be made public."

40. Since the Court of Appeal judgment then dealt with the issues relating to the hearing having been in private and not the substance of the sealing application, I agree with the submission made by Mr Tilley on behalf of the Attorney-General that the judgment at first instance is the main source of the principles to be applied on the substance of a sealing application.

Submissions of the parties

41. On behalf of the applicant, Mr Buckley submitted that the hearing should be conducted in private, primarily because a hearing in public would risk defeating the purpose of the application. He emphasised that it would be difficult if not impossible to address the provisions of the will or the position of the applicant at a public hearing. As counsel for the executor had submitted in the *Prince Philip* case, he submitted that the provisions of CPR 39.2(3) were of relevance and applied by analogy, even though by rule 3 of the NCPR, The Rules of the Supreme Court as they were in force immediately before 26 April 1999 apply to non-contentious probate matters. CPR 39.2(3) provides:

> "(3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice –
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> (a) publicity would defeat the object of the hearing;
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> (b) it involves matters relating to national security;
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> (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
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> (d) a private hearing is necessary to protect the interests of any child or protected party;
>
> (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;
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> (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or
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> (g) the court for any other reason considers this to be necessary to secure the proper administration of justice."

42. Mr Buckley submitted that (c) and (f) were of particular relevance. However, he also submitted, as did Mr Tilley on behalf of the Attorney-General, that in order to avoid any suggestion of a "cover-up" and to maintain confidence in the court process, a fully reasoned "open" judgment would be appropriate.

43. In relation to paragraphs 1 and 2 of the draft Order which seek an Order sealing of the will for 70 years and that no copy be kept on the record or the Court file and an Order that the will should not be inspected without the consent of the Chancellor of the High Court for the time being, Mr Buckley submitted that making the will publicly available would be both "undesirable" and "inappropriate". He submitted that the concern of the applicant as to his life being put at risk if the will and its provisions were open to inspection was fully justified by the facts and matters concerning the Deceased set out in the Background section of this judgment above.

44. In relation to the five factors identified by Mr Smith in the *Prince Philip* case set out at [32] above, Mr Buckley submitted in relation to (a) and (b) that, in the circumstances, there was no risk of effect not being given to the wishes of the Deceased and in any event, the applicant intends to instruct his current solicitors to carry out the administration of the estate. Factor (c) does not arise since the only known creditors are the claimants in the Northern Ireland proceedings who are aware that an application for a grant is being made. The applicant intends to instruct the existing solicitors in Northern Ireland to continue to act in respect of those claims. In relation to factors (d) and (e), Mr Buckley submitted that the death had been high profile so that anyone with another will or a claim under the Inheritance Act would have emerged by now.

45. Accordingly, Mr Buckley submitted that none of the general factors supporting the will being open to inspection was of any application here and there was no general public interest in anyone seeing the will.

46. Mr Buckley submitted that, if necessary, he would also rely on Articles 2, 3 and 8 of the European Convention on Human Rights ("ECHR") and that assistance could be drawn from the so-called *Venables* jurisdiction recently summarised in the context of covert human intelligence sources by Chamberlain J in *Attorney-General v British Broadcasting Corporation* [2022] EWHC 826 (QB); [2022] 4 WLR 74. At [35] and [37] the judge held:

> "35. The significance of Articles 2 and 3 to the protection of identities was first identified by Dame Elizabeth Butler-Sloss P in *Venables v News Group Newspapers Ltd* [2001] Fam 430. In that case, the court granted a *contra mundum* injunction protecting the new identities of the men who, when boys, had murdered Jamie Bulger. The relief was granted on the basis of evidence of a real and immediate risk of reprisals if the new identities were disclosed. The phrase "real and immediate risk" comes from the decision of the European Court of Human Rights in *Osman v UK* (2000) 29 EHRR 245, where the Court explained at [116] that a state could be responsible for a breach of Article 2 ECHR "where the authorities knew or ought to have known at the time of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.
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> 37. In *RXG v Ministry of Justice* [2019] EWHC 2026 (QB), [2020] QB 703, at [35], the Divisional Court (Dame Victoria Sharp P and Nicklin J) recently summarised the principles governing the exercise of the *Venables* jurisdiction, as they understood them. These principles include the following:
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> "(iii) The threshold at which article 2 and/or article 3 is engaged has been described as: 'the real possibility of serious physical harm and possible death' (*Venables,* [94]); 'a continuing danger of serious physical and psychological harm to the applicant' (*Carr,* [4]); an 'extremely serious risk of physical harm' (*Edlington,* [36]).
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> (iv) In *Venables* ([87]-[89]) Dame Elizabeth Butler-Sloss P … held that the test is not a balance of probabilities but rather that the evidence must 'demonstrate convincingly the seriousness of the risk' and raise a real possibility of significant harm: a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm.
>
> (v) Where an applicant demonstrates, by cogent evidence, that there is a real and immediate risk of serious physical harm or death, then there is no question of that risk being balanced against the article 10 interests: *Carr*, at [2].

> (vi) In cases where articles 2 and 3 are not engaged and the conflict is between the article 8 and article 10 rights, neither right has precedence over the other. What is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case. The justifications for interfering with or restricting each right must be taken into account and a proportionality test must be applied: *Edlington,* [28].
>
> (vii) The rights guaranteed by articles 2 and 3 are unqualified. Where the evidence demonstrates that there is a real and immediate risk of serious harm or death this cannot be balanced against any article 10 rights, no matter how weighty. In that context, it should be noted that we would respectfully depart from the proposition articulated by Sir Geoffrey Vos C in *Edlington,* [35] that article 2 and 3 rights could be balanced against article 10 (a proposition later adopted by Sir Andrew McFarlane P in *Venables v News Group Newspapers Ltd* [2019] EWHC 494 (Fam), [2019] 2 FLR 81, [43]).
>
> (viii) However, where evidence of a threat to a person's physical safety does not reach the standard that engages articles 2 and/or 3, then the evidence as to the risk of harm will usually fall to be considered in the assessment of the person's article 8 rights and balanced against the engaged article 10 rights. Whilst the level of threat may not be sufficient to engage articles 2 or 3, living in fear of such an attack may very well engage the article 8 rights of the person concerned."

47. Mr Buckley submitted that the Court's power under rule 58 of the NCPR must be exercised consistently with the applicant's rights under the ECHR. There was a real possibility of serious physical harm and possible death (adopting the *Venables* test) if the will were to be made public. The High Court in Northern Ireland had considered there was a real risk to the Deceased's life because of the allegations that he was Stakeknife, both in the judicial review proceedings in 2003 and when granting the injunction in 2006. There was a real risk that people would assume that the applicant and those named in the will were guilty by association. Accordingly, Mr Buckley submitted that Articles 2 and 3 are engaged and that the fear of reprisals if the contents of the will were made public was such as to engage the Article 8 rights of the applicant and those named in the will. Unlike in *Venables* there were no countervailing Article 10 rights.

48. Mr Buckley also sought an Order under paragraph 3 of the draft Order that a grant of administration in common form be made to the applicant without annexing a copy of the will. He noted from the judgment of Sir James Munby P in the *Duke of Windsor* case that the will and codicil of the Duke of Windsor were not annexed to the Letters of Administration, indicating that it was possible to make such an Order.

49. Paragraph 4 of the draft Order sought to address the position of His Majesty's Revenue and Customs ("HMRC"). Before the applicant can obtain a grant, it will be necessary to file an inheritance tax account with HMRC whose practice is to require a copy of the will to be filed along with the account. On the basis that the will is sealed, it would be inappropriate to file a copy of the will with HMRC, so paragraph 4 seeks to avoid the possibility of HMRC insisting on sight of the will.

50. By paragraph 5 of the draft Order, Mr Buckley seeks a limited confidentiality Order restricting the right of non-parties to obtain documents from the Court records or to inspect the Court file, without which he submitted that there was risk of the relief sought being rendered futile. He submitted that in *Dring v Cape Intermediate Holdings* [2019] UKSC 38; [2020] AC 629, the Supreme Court at [46] had recognised that there may be good reasons for denying access to the court file. He noted that an application for permission to have access to documents on the Court file may be made under CPR 5.4C(2) without notice by virtue of CPR 5.4D(2). The Order sought simply required 14 days' notice to be given to applicant (through his solicitors) of any such application.

51. In relation to costs, Mr Buckley accepted that the Attorney-General's costs should be paid out of the estate.

52. On behalf of the Attorney-General Mr Tilley supported the application to seal the will. As the Attorney-General had done in the *Prince Philip* case, he adopted the balance sheet format. He started with the factors weighing in favour of publication of the will and of refusing the application. In terms of historic or journalistic interest, he submitted that the Deceased's wishes in the will were in essentially standard form and nothing unusual or intimate was expressed that he might have wished to keep private. However, given the will was in essentially standard form, the likely level of public interest in the will itself was minimal.

53. The next factor was prevention of fraud. Mr Tilley referred to what was said by Sir Mark Potter P in *Brown* at [51]:

> "…in respect of what Mr Robertson calls 'the transparency interest' in seeing that nothing is being done improperly or unlawfully or that there are grounds for suspecting undue influence or foul play, these are scarcely matters which are likely to appear from inspection of the will itself. They are matters which, as in the case of any other will, fall within the responsibilities of the executors and in respect of which remedies are available to aggrieved parties under ordinary probate procedures."

Mr Tilley submitted that the Court could be confident that the sealing of the will would not be assisting fraud since the will would be professionally administered and the applicant was prepared to be substituted as a defendant in the proceedings in Northern Ireland.

54. He submitted that those were the only two matters which went into the balance in favour of inspection and all the other matters favour sealing. In relation to both additional creditors (beyond the claimants in Northern Ireland) and any potential claimants under the Inheritance Act, the important thing was that the death was well-publicised so that they had had an opportunity to make any claim and could still do so even if the will were sealed. In relation to the possibility of there being another will, given the publicity the death had received, one would have expected anyone with such a will to have sought a grant. There was no question of the wishes of the testator being adversely affected by sealing.

55. He submitted that a good cross-check for establishing that publication of the will was undesirable and inappropriate was that there was a public interest in upholding the applicant's rights under the ECHR. The test under Rule 58 of the NCPR, as Sir Andrew McFarlane P said in the *Prince Philip* case at [51] did not require any gloss on the ordinary meaning of "undesirable" and "inappropriate" and the hurdle is not an especially high one.

Discussion

56. As Sir Andrew McFarlane P said in the *Prince Philip* case, the hurdle set by the test in Rule 58 of the NCPR is not a high one. I have concluded that in the present case that test is amply satisfied and that publication of the Deceased's will would be both undesirable and inappropriate. I agree with Mr Tilley that, looking at the various factors which might be said to favour publication, none of them is of any significance in the present case and, in any event, they do not begin to outweigh the much more compelling factors which favour the sealing of the will.

57. In terms of historic or journalistic interest, the death of the Deceased has been well-publicised. There is nothing in the will, which is in fairly standard form, which could conceivably be of interest to the public or the media. Furthermore, in circumstances where the will is going to be professionally administered by the applicant's solicitors, there is no question of publication of the will being desirable or appropriate in order to prevent fraud.

58. None of the factors favouring publication identified by Mr Julian Smith in the *Prince Philip* case as set out at [32] above is applicable in the present case. There is no suggestion that the Deceased's wishes included general publication of his will, nor has it been suggested that publication is necessary to facilitate the tracing of legatees. The Deceased's creditors are already aware of his death and arrangements will be made to substitute the applicant as a defendant in the Northern Irish proceedings.

59. Given the extent of the publicity that there was in the media of the Deceased's death in 2023, if there were another will somewhere it would surely have emerged and the executor(s) or legatees under it would have sought a grant. Equally, if there were potential claimants under the Inheritance Act, they would have brought claims by now and, in any event, could still do so even if the will is sealed.

60. As I have said, those factors are far outweighed by those in favour of sealing the will, in particular the need to protect the applicant and those named in the will from the real risk of serious physical harm or even death because they might be thought to be guilty by association with the Deceased. The real risk to his life and wellbeing which the Deceased faced in his lifetime is amply demonstrated by the facts and matters set out in the Background section of this judgment. Publication of the will would be both undesirable and inappropriate.

61. Given that I have concluded that the test for sealing the will in Rule 58 of the NCPR is satisfied, it is not strictly necessary to consider the alternative basis on which Mr Buckley put his case, that publication would breach the applicant's rights under Articles 2, 3 and 8 of the ECHR. However, I consider that this alternative case is also

made out for the reasons Mr Buckley gave, summarised at [47] above. That case under the ECHR strengthens and supports the case for sealing the will under Rule 58 of the NCPR.

62. Accordingly, I have made an Order in the terms of paragraphs 1 and 2 of the draft Order sealing the will for 70 years which will protect the applicant and those named in the will and ensure that the will cannot be inspected other than with the consent of the Chancellor of the High Court for the time being, a similar protection to that which applied in the *Duke of Windsor* case.

63. Given that Order sealing the will, the other ancillary Orders sought by the applicant essentially follow automatically. The limited order in relation to confidentiality in paragraph 5 will ensure that for the purposes of CPR 5.4C and D, no document on the Court file can be inspected without appropriate notice being given to the applicant and without the permission of the Court.

64. Paragraphs 3 and 4 will ensure that a grant of administration can be made without attaching the will and that the inheritance tax account can be filed with HMRC without a copy of the will being provided to HMRC, both provisions that will protect the process of sealing the will.

65. It is accepted by the applicant that the costs of the Attorney-General should be paid from the estate and assessed if not agreed.

66. Finally, I should add in relation to my decision to hold the hearing in private that I reached that decision essentially for the same reasons as justified granting the substantive applications to seal the will. Holding a public hearing would have defeated the whole object of the application and to the extent that matters were ventilated at the hearing which it is possible to disclose in public without defeating that object, they are reflected in this open judgment. In the circumstances it was not necessary to give a "closed" judgment.